Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

No. 90-1269

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,

Petitioners,

v.

PAUL CROWE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Office Of The City Attorney
The City Of Daytona Beach
301 South Ridgewood Avenue
P.O. Box 2451
Daytona Beach, Florida 32115
Phone: 904-258-3195
Telecopier: 904-258-3152

FRANK B. GUMMEY, III
City Attorney
Counsel of Record

MARIE HARTMAN
Assistant City Attorney

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Respondents would state the question presented as number III. as follows:

III. Does the imposition of attorneys' fees and double costs upon appellants under Fed. R. App. P. 38, without notice or an opportunity to be heard, violate due process requirements where the court found that the appellants' brief contained only conclusory assertions unsupported by argument or reason?

LIST OF PARTIES BELOW

Petitioners identified one of respondents as "City of Daytona Beach, a former municipal corporation". The City of Daytona Beach is currently in existence and is correctly identified:

THE CITY OF DAYTONA BEACH, a Florida municipal corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

ARGUMENT SUPPORTING DENIAL OF THE WRIT 3

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) . . 2, 10

California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972) 5, 6

City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985) 2, 6

City of Newport v. Iacobucci, 479 U.S. 92, 107 S. Ct. 383, 93 L. Ed. 2d 862 (1986) 5

Corpus Christi Taxpayer's Association v. City of Corpus Christi, 858 F.2d 973 (5th Cir. 1988), *rehearing denied*, 860 F.2d 437 (5th Cir.), *cert. den.*, 490 U.S. 1065, 109 S. Ct. 2064, 104 L. Ed. 2d 629 (1989) 11

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) . . 2, 10

Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975) 7

Erznoznik v. City of Jacksonville, 442 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) 7

Fillingim v. Boone, 835 F.2d 1389 (11th Cir. 1988) 4

Hatch v. Reliance Ins. Co., 758 F.2d 409 (9th Cir.), *cert. den.*, 474 U.S. 1021, 106 S. Ct. 571, 88 L. Ed. 2d 555 (1985), *motion for damages pursuant to Sup. Ct. R. 49.2 granted*, 474 U.S. 1048, 106 S.Ct. 782, 88 L.Ed.2d 761 (1986) 10

Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192 (7th Cir. 1987) 9, 11

Houston v. Hill, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) 1, 3, 7

TABLE OF AUTHORITIES – Continued

Page

Hyde v. Van Wormer, 474 U.S. 992, 106 S. Ct. 403, 88 L. Ed. 2d 355 (1985) 9, 10

Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) 1, 3, 4

Lanier v. City of Newton, 842 F.2d 253 (11th Cir. 1988) 4

Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), *cert. granted sub nom. Barnes v. Glenn Theater*, ___ U.S. ___, 111 S. Ct. 90, 112 L. Ed. 2d 15 (1990) 7

New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2529, 69 L. Ed. 2d 357 (1981) 2, 5, 6

Oyler v. Boles, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962) 5

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) 7

Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980) 2, 7, 8

Schad v. Borough of Mt. Ephriam, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) 7

Toepfer v. Department of Transportation, 792 F.2d 1102 (Fed. Cir. 1988) 8, 9, 11

United States v. Nesglo, Inc., 744 F.2d 887 (1st Cir. 1984) 9

Virginia v. American Booksellers Assn., 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1927 ..... 2, 7, 10, 11

RULES

Fed. R. App. P. 38 ..... *passim*
Fed. R. Civ. P. 11 ..... 10, 12
Fed. R. Civ. P. 37 7
Sup. Ct. R. 42.2 13
Sup. Ct. R. 49.2 (now R. 42.2) 9, 10

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF THE ARGUMENT

I. Petitioners have offered no applicable support for their argument that the decision below conflicts with precedent established by this Court on the issue of selective enforcement. The cases relied on by petitioners are *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), which found a city ordinance unconstitutionally overbroad, and *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), which held a state statute unconstitutionally vague.

II. Petitioners urge that the City of Daytona Beach ordinance prohibiting certain exposure in establishments dealing in alcoholic beverages must be more narrowly construed in order to meet constitutional requirements established by this Court. Again, the cases relied on by petitioners do not support their position. The City ordinance was enacted pursuant to twenty-first amendment authority to regulate alcohol as in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2529, 69 L.Ed.2d 357 (1981); the cases relied on by petitioners to limit the City's authority to regulate nudity do not involve such restrictions as a component of liquor regulation. And the 1981-82 state court opinions which petitioners argue were binding on the federal court were no longer viable after the Florida Supreme Court ruling in *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985).

III. This case, in which double costs and attorneys' fees were awarded against petitioners pursuant to Fed. R. App. P. 38, does not conflict with *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), and the other cases cited by petitioners. *Roadway Express* and *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987), dealt with sanctions imposed directly against an attorney for disciplinary purposes pursuant to other provisions of law. *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), was concerned with the imposition of fees as a sanction against an attorney pursuant to both 28 *U.S.C.* § 1927 and Fed. R. App. P. 38, and required a hearing to determine whether the attorney or the party was at fault. Courts dealing solely with Fed. R. App. P. 38 have not required a

hearing prior to imposition of sanctions because no factual issues exist. In this case, a hearing would serve no purpose since the court found the appeal frivolous as a matter of law and awarded damages against the party appellants.

ARGUMENT SUPPORTING DENIAL OF THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY PRECEDENT OF THIS COURT ON THE ISSUE OF UNCONSTITUTIONAL SELECTIVE ENFORCEMENT.

The Eleventh Circuit denied petitioners' claims that the challenged ordinance is unconstitutionally vague, unconstitutionally overbroad, and that the City enforced the ordinance in an unconstitutionally selective manner. Petitioners now merge these three distinct constitutional theories and claim that the ordinance is selectively enforced in violation of *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), and *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

Selective or discriminatory enforcement is referred to in *Houston v. Hill* and *Kolender v. Lawson* only as an *effect* of vagueness or overbreadth.

Houston v. Hill is an overbreadth case. It involved a Houston city ordinance which prohibited interrupting a police officer. This Court found that the ordinance was overbroad in that it was susceptible of regular application to protected expression and therefore invalid. This Court

specifically found that the ordinance was not vague. Selective enforcement as a constitutional violation in itself was not discussed.

Kolender v. Lawson is a vagueness case. A California statute requiring persons who loiter on streets to provide "credible and reliable" identification was held to be unconstitutionally vague on its face. *Kolender* did not involve claims of overbreadth or unconstitutionally selective enforcement.

Petitioners cite no cases which deal with selective enforcement as a constitutional violation. The Eleventh Circuit stated:

> According to the plaintiffs, this selective enforcement violates their right to equal protection under the fourteenth amendment. The district court analyzed this claim under the two-part selective enforcement standard set out in *Fillingim* [*v. Boone*, 835 F.2d 1389 (11th Cir. 1988)] and *Lanier* [*v. City of Newton*, 842 F.2d 253 (11th Cir. 1988)]. The court held that, although the plaintiffs had demonstrated under the standard's first element that they were singled out for prosecution among others who were similarly situated, the plaintiffs had not satisfied the standard's second requirement that this selection was invidious or in bad faith. 715 F. Supp. at 340. Again, the plaintiffs on appeal fail to state, let alone demonstrate, how the district court's conclusion is erroneous. That failure alone renders their appeal frivolous * * *

Petitioners' App. A-19.

Petitioners have made a similarly unsupported argument to this Court. The district court and the Eleventh Circuit followed precedent clearly established by this

Court in determining the selective enforcement issue, *see Oyler v. Boles*, 368 U. S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962), and petitioners have suggested no basis for error.

II. THE OPINION OF THE ELEVENTH CIRCUIT APPROVING THE DISTRICT COURT'S INTERPRETATION OF THE CITY'S ORDINANCE PROHIBITING NUDITY OR SEMI-NUDITY IN ESTABLISHMENTS DEALING IN ALCOHOLIC BEVERAGES CONFORMS TO THE PRECEDENTS SET BY THIS COURT IN *LaRUE, BELLANCA,* AND *IACOBUCCI*.

Petitioners present opinions written by state lower court judges in 1981-82, and submit that the Eleventh Circuit Court of Appeals erred in rejecting the judges' narrowing constructions of the ordinance. This appears to be an overbreadth argument.

In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), this Court found that the broad powers of the states to regulate liquor under the twenty-first amendment outweigh first amendment interests in protecting nude dancing, and that a state could ban such activity as part of its liquor regulation program. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2529, 69 L.Ed.2d 357 (1981), held that this authority supported a state statute prohibiting topless dancing in licensed liquor establishments. And in *City of Newport v. Iacobucci*, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 862 (1986), this Court found that a state could delegate its twenty-first amendment powers to a city either in whole or in part, and upheld a city ordinance prohibiting nude or

nearly nude activity in a business establishment licensed to sell liquor for on-premises consumption.

At the time of the 1981-82 lower state court opinions cited by petitioners, it had not been determined whether the State of Florida had delegated to the City the authority which was relied on in *LaRue* and *Bellanca* to regulate liquor pursuant to the twenty-first amendment. This issue reached the Florida Supreme Court in 1985. It was held that the State of Florida has delegated its powers under the twenty-first amendment to the City. *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985).

The pre-1985 inferior state court decisions which petitioners urge this Court to accept as the correct interpretations of the ordinance were rendered without reliance on the powers available via the twenty-first amendment. In regard to these decisions, the Florida Supreme Court stated:

> The [Florida] district court [of Appeal] found that the variant interpretations of the ordinance demonstrated it was vague and therefore unconstitutional. We conclude, on the other hand, that the plain meaning of the ordinance is clear, and that the variant interpretations are merely the result of various courts attempting to limit the reach of the ordinance to save it from constitutional invalidity.

Del Percio, 476 So.2d at 200. The court found that the ordinance was neither vague nor overbroad in light of the twenty-first amendment, and that limiting constructions were unnecessary. *Id.* Accordingly, the inferior state court rulings prior to the 1985 Florida Supreme Court *Del Percio* decision have no precedential effect.

Petitioners cite *Schad v. Borough of Mt. Ephriam*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), *Erznoznik v. City of Jacksonville*, 442 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), and *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), in support of their argument. None of these cases supports their contention that the ordinance is unconstitutional when the City's twenty-first amendment authority is considered. Similarly, petitioners' reference to *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), *cert. granted sub nom. Barnes v. Glenn Theater*, ___ U.S. ___, 111 S.Ct. 90, 112 L.Ed.2d 15 (1990), is inapposite. The Indiana statute challenged was not enacted pursuant to the twenty-first amendment and applies to all public places without regard to alcohol.

III. THE IMPOSITION OF SANCTIONS WITHOUT PRIOR NOTICE OR A HEARING PURSUANT TO FED. R. APP. P. 38 DOES NOT CONFLICT WITH *ROADWAY EXPRESS, INC. v. PIPER*.

Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), did not involve an award of attorneys' fees to be paid by an appellant pursuant to Fed. R. App. P. 38. At issue in that case were the authority of the trial court to tax attorneys' fees directly against counsel pursuant to Fed. R. Civ. P. 37(b) (sanctions for discovery violations), 28 *U.S.C.* § 1927 (sanctions for

unreasonable and vexatious multiplication of proceedings by attorney), and the inherent powers of the court.

The section of the opinion quoted by petitioners was a discussion of inherent powers to award attorneys' fees for abuse of the process of the courts. 447 U.S. at 764-767, 100 S.Ct. at 2463-2465. This Court stated that these inherent powers must be exercised with "restraint and discretion". *Id.* at 764, 100 S.Ct. at 2463. This Court also noted that the trial court had not made a specific finding as to whether the attorney's conduct "constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent power." *Id.* at 767, 100 S.Ct. at 2465. The matter was returned to the district court for further proceedings.

Unlike the award in *Roadway Express*, the award of attorneys' fees here under Fed. R. App. P. 38 did not require a finding of bad faith. Sanctions imposed pursuant to Rule 38 have been distinguished.

In *Toepfer v. Department of Transportation*, 792 F.2d 1102 (Fed. Cir. 1988), the appellate court had awarded damages and costs against counsel for a petitioner pursuant to Fed. R. App. P. 38. Counsel filed a motion for hearing and other relief, claiming that sanctions could not be imposed without notice and a hearing. The court denied the motion, and stated:

> The damages and costs assessed against counsel were for bringing a frivolous appeal, not as a disciplinary action for conduct unbecoming an attorney or for violation of the federal rules or rules of the court. Rule 38 provides that, if the appeal is frivolous, damages and costs *may* be assessed. To require a hearing

> for the assessment of such damages and costs would impose on the opposing party and on the court an even greater burden in dealing with a frivolous appeal and entirely defeat the purpose of Rule 38. *See, e.g., Hyde v. Van Wormer,* ___ U.S. ___, 106 S.Ct. 403, 88 L.Ed.2d 355 (1985) (Supreme Court awarded damages under its Rule 49.2 without a hearing).
>
> * * * Counsels' assertion of a constitutional violation by failure to provide a hearing is an attack on the rule itself.

792 F.2d 1103.

The Seventh Circuit Court of Appeals discussed its procedures in Rule 38 cases as follows:

> Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct. Where a hearing is pointless it is not required, *see United States v. Nesglo, Inc.,* 744 F.2d 887 (1st Cir. 1984); * * *
>
> * * * *
>
> * * * A hearing is required in a proceeding concerning sanctions only if there is a contested factual issue; there is not and cannot be one in this case.

Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192, 1201-2 (7th Cir. 1987). The court imposed sanctions against an appellant's attorney without a hearing, recognizing that this was its usual procedure. *Id.*

The Ninth Circuit has also imposed Rule 38 sanctions without a hearing. *See, e.g., Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir.) (double costs to be paid by appellants and attorneys' fees to be paid by appellants' counsel, awarded pursuant to Rule 38 without a hearing), *cert. den.*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985), *motion for damages pursuant to Sup. Ct. R. 49.2 granted*, 474 U.S. 1048, 106 S.Ct. 782, 88 L.Ed.2d 761 (1986).

As mentioned by petitioners, the sanctions imposed by the Eleventh Circuit in *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987), were pursuant to Fed. R. Civ. P. 11. The case contains a general discussion of due process in the context of disciplinary sanctions imposed against an attorney, but is of no particular assistance in resolving the issue raised here. The Eleventh Circuit also decided the present case, and imposed *Rule 38* sanctions without a hearing. Petitioners raised the due process issue before the Eleventh Circuit in a petition for rehearing or rehearing en banc; rehearing was denied. Petitioners' App. B.

In *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), a hearing was required prior to imposition of sanctions against an attorney where the sanctions were imposed with reliance on *both* Fed. R. App. P. 38 and 28 *U.S.C.* § 1927. The court discussed the due process requirements without distinguishing between the two different provisions for the imposition of sanctions, *id.* at 1513-15, and stated:

> In one sense notice may seem superfluous when an appellate court has determined, after considering briefs, argument and the record that

> the appeal is so unmeritorious as to be frivolous. The court's determination is a judgment on the state of the law as applied to the facts in the record. The only possible rebuttal to the court's conclusion would be a demonstration that the court overlooked controlling statute or case law or misread the record. A petition for rehearing would seem adequate to bring such errors to the court's attention.

Id. at 1514.

The Tenth Circuit, however, found that a hearing was required for one purpose:

> [T]he determination to impose sanctions *on an attorney* for bringing a frivolous appeal involves another step – placing the blame. And there remains for consideration the defenses which might absolve the lawyer for the responsibility for taking the frivolous appeal. This, we hold, justifies and requires notice and opportunity to be heard before final judgment.

Id. (emphasis supplied). Under the cases cited above where sanctions were imposed solely on the authority of Rule 38, no defense would be available. *Hill*, 814 F.2d 1192; *Toepfer*, 792 F.2d 1102.

The approach of the Fifth Circuit has been to assess attorneys' fees without a hearing against the party pursuant to Fed. R. App. P. 38 and against counsel citing 28 *U.S.C.* § 1927, and then to remand the case to the district court for proceedings to apportion blame. *See, e.g., Corpus Christi Taxpayer's Association v. City of Corpus Christi*, 858 F.2d 973 (5th Cir. 1988), *rehearing denied*, 860 F.2d 437 (5th Cir.), *cert. den.*, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989).

In the case at issue, the sanction imposed was against petitioners only (appellants below), not their counsel, although the court noted that Fed. R. Civ. P. 11 sanctions had previously been imposed against petitioners' attorney by the district court in a case involving the same issues. Petitioners' App. A-10 n.7. Petitioners have cited no cases to suggest that *parties* can be absolved from responsibility for their own litigation, the only issue which *Braley* found necessitated a hearing.

The opinion of the Eleventh Circuit Court of Appeals clearly sets forth the basis of its decision that the appeal in this case was frivolous. The court found that petitioners ignored established precedent, Petitioners' App. A-8, 9, 14, 18; cited inapplicable case law as support for their arguments, Petitioners' App. A-14; failed to distinguish authority which clearly rejected their position, Petitioners' App. A-14; and totally failed to provide legal support or argument to support contentions of error, Petitioners' App. A-11, 14, 15, 19. Double costs and attorneys' fees were awarded to the City against petitioners as damages pursuant to Fed. R. App. P. 38 upon the finding that the appeal was frivolous. So distinguished, the opinion in this case does not conflict with any precedent cited by petitioners.

CONCLUSION

The opinion of the court below follows clearly established precedent. No conflict with this or any other court has been shown. The petition for certiorari in this case is frivolous and should be denied, with damages awarded to respondents in accordance with Supreme Court Rule 42.2 and respondents' motion filed under separate cover.

Respectfully submitted,

Office Of The City Attorney
The City Of Daytona Beach
P.O. Box 2451
Daytona Beach, FL 32115-2451
(904) 258-3194

FRANK B. GUMMEY, III
City Attorney
Counsel of Record

MARIE HARTMAN
Assistant City Attorney